No. 91-164

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY, a Division of the K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STEPHEN P. HALBROOK *
10605 Judicial Drive
Suite B-3
Fairfax, VA 22030
(703) 385-8610
Attorney for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Contender single-shot pistol and carbine kit, which are intended to be made only as a pistol with a 10″ barrel and as a rifle with a 21″ barrel, nonetheless constitute a rifle having a barrel of less than 16″ in length under the Internal Revenue Code, § 5845(a)(3), even though not made as such and even though the United States concedes that use of two receivers would remove these parts from such taxation.

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STATEMENT OF THE CASE

The Contender sporting pistol has been made by Thompson/Center Arms * since 1967. It has a 10″ barrel, is inconcealable, and is a single shot, requiring each cartridge to be loaded and unloaded by hand before another shot can be fired. Out of 400,000 Contender pistols manufactured, the company is unaware of a single person ever using a Contender in a crime. The pistol has taken top honors as the leading pistol for hunting and target competition. (App. 2a; Court of Appeals Appendix 56-57.)

* Respondent has no parent companies or subsidiaries.

The Thompson/Center carbine kit consists of a 21" barrel, a wooden foreend to hold the carbine while shooting, and a shoulder stock. Removal of the 10" pistol barrel, foreend, and hand grip allows use of the pistol frame or receiver (the part which holds internal parts and to which the barrel and stock attach) to be assembled with the carbine kit parts to make a carbine (a type of rifle). The following conspicuous warning is molded on the carbine shoulder stock: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES." More detailed warnings to avoid violation of the National Firearms Act ("NFA") are included in the kit instructions. App. 2a.

Sportsmen, who would provide the only market for the Contender pistol and carbine kit, have no incentive to make a rifle with a barrel less than 16". The sportsmen who would use this product are generally law-abiding, and also the 10" pistol barrel used with a shoulder stock would have no sporting utility.

Nor would criminals have any motive to make a rifle with a barrel under 16" from the Contender pistol and carbine kit. A Contender with a 10" barrel and a huge shoulder stock is even less concealable than a Contender pistol. No criminal demand for single shot firearms exists.[1]

A retired BATF expert examined a complete Contender pistol and a complete Contender carbine. It took him over 10 minutes to remove and assemble parts on these guns in such a way as to simulate the time it would take

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[1] Indeed, the Bureau of Alcohol, Tobacco, and Firearms ("BATF") has removed large numbers of semiautomatic pistols with instantly attachable shoulder stocks, and rifles with barrels less than 16", from the NFA. Almost all items on BATF's curio and relic list are short-barrel rifles removed from the NFA because they are "not likely to be used as a weapon." 26 U.S.C. Section 5845(a) (last sentence); Appeals Appendix 48-49.

to convert a pistol into a carbine using a carbine kit. (Appeals Appendix 48.)

Any rifle or shotgun barrel is capable of being readily made into a short-barrel NFA firearm with a hacksaw. A 21" Contender carbine barrel can be cut off in 25 seconds with a common hacksaw. (Appeals Appendix 103-104.) Moreover, a complete Contender pistol and a complete Contender carbine are capable of having parts exchanged to make an NFA firearm, but BATF concedes that these items do not constitute a short-barrel rifle.

In 1971, Rex D. Davis, the BATF Director, wrote to Thompson/Center as follows:

> You asked if it would be legal to utilize the receiver of the Contender pistol in making up a single shot carbine with a barrel 18 inches long and with a full shoulder stock.
>
> You are advised that the manufacture of a carbine such as you describe, by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the National Firearms Act . . . .
>
> In view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine to less than 16 inches, whether by substitution of the carbine barrel with one of your pistol barrels or otherwise, or the reduction of the overall length of the weapon to less than 26 inches would constitute the making of a firearm within the purview of Section 5845(a) of the National Firearms Act. (Appeals Appendix 31-32.)

In 1973, BATF addressed the "Sportsman's Kit," consisting of a pistol with interchangeable 16" and 4" barrels and a shoulder stock. The BATF Assistant Director

determined that the items are not an NFA firearm, and recommended that the manufacturer provide warnings not to attach the shoulder stock to the gun when the 4″ barrel is installed. (Appeals Appendix 34.) Several more letter rulings over the years repeated that to be an NFA rifle, the shoulder stock must be attached. (*E.g.*, *id.* at 35-38, 60). The government does not mention these letter rulings. *See* Petition 3 n.3.

The above was disregarded by a subordinate employee who wrote a letter in 1985 claiming that the Contender pistol and carbine kit just introduced by Thompson/Center Arms was a short-barrel rifle under the NFA, even though not assembled as such. BATF happily administered the NFA in the years 1968-1985 without the sky falling, despite its view that pistols and carbine kits are not NFA firearms.

The purpose of the conversion kit is to make a rifle with a 21″ barrel, not, as the government states in its version of the Question Presented, to "allow the pistols readily to be converted into rifles with 10-inch barrels." [2] That is like saying that Thompson/Center manufactures rifles with 21″ barrels that "allow" the barrels readily to be sawed off, or that the company manufactures firearms that "allow" persons readily to murder other persons.

The government claims that a unit that includes a receiver, 10″ barrel, and shoulder stock "is literally a weapon 'designed . . . and intended to be fired from the shoulder' " with a barrel less than 16″. Petition 7. This is not the case if the unit includes a 21″ barrel with warnings and instructions not to assemble a rifle with a

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[2] Also in the Question Presented the government incorrectly asserts that Thompson/Center "manufactures" conversion kits. Kits were manufactured only for a brief period in 1985. Only one pistol and carbine kit were possessed as a unit in connection with the payment of the $200 tax and the claim for a refund.

barrel under 16″. No "weapon" exists unless it is assembled, because mere parts cannot be fired. The "design" of the manufacturer and the "intent" of the user is to make only a pistol with a 10″ barrel or a rifle with a 21″ barrel.

The government misrepresents the version of the facts set forth by the Court of Appeals. That court allegedly claimed that "the short-barrel Contender rifle" is unlike silencers because it is not a gangster device. Petition 14, claiming to cite App. 15a. Instead, the court found that the pistol and carbine kit with 21″ barrel is *not* a short-barrel rifle.

The government refers to "the distinction between 'good' and 'bad' short-barrel rifles that the court of appeals seeks to draw." Petition 14. To the contrary, the court found that the items at issue are not a short-barrel rifle at all.

The government also distorts the Court of Appeals' discussion of contrasting "combination-of-parts" definitions. The Court was concerned with the definitions of machinegun, destructive device, and silencer as including a complete combination of parts from which such weapons could be assembled (with various intent standards), and the lack of any such definition of rifle. App. 7a-8a. Yet the government misreads the court as being concerned with a combination of parts to *convert* a weapon into a rifle. Petition 10. The court did not remotely suggest, as does the government, that this case concerns whether a conversion kit alone is regulated by the NFA.[3] Petition 10-11.

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[3] Until now the parties and courts have been concerned only with the definitions of machinegun, destructive device, and silencer as including a combination of parts from which a complete weapon can be assembled. Only now is the government interjecting the irrelevant definition of machinegun as including "any part designed and intended solely and exclusively, or combination of parts designed and

In still another red herring, the government claims that the Court of Appeals concluded that a "firearm"—by implication, any NFA "firearm"—is not "made" until assembled. Petition 7. Yet the court acknowledged the varied definitions of "firearm" in the NFA, which defines machineguns and certain other weapons as being made when a complete combination of unassembled parts is possessed, but does not so define rifles. The court's opinion is not a serious threat to the enforcement of the NFA because it does *not* require "that a *firearm* be fully assembled." Petition 15. The court ruled that a rifle and carbine kit which will never be assembled as a short-barrel rifle, is not such a rifle. The opinion does not address other NFA "firearms" other than to acknowledge that some types (such as machinegun) need not be assembled. Accordingly, the government's whining about trafficking in dangerous "firearms" and circumvention of the NFA evaporates. Petition 15-16.

The government contradictorily assets that sporting or criminal use in defining a weapon is irrelevant, but that the court's opinion will allow weapons of mass destruction. Petition 14, 16. It raises the bogeyman word "Uzi," failing to note that normally that term refers to a machinegun and thus is subject to a combination of parts definitions.[4] Generally, a short-barrel rifle is less

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intended, for use in converting a weapon into a machinegun. . . ." 26 U.S.C. § 5845(b). Only the next phrase of that subsection is relevant here—"any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Contrary to the government, destructive device is not defined to include a mere conversion kit. Petition 11 n.8. Rather, 26 U.S.C. § 5845(f)(3) requires that all the parts to assemble a complete destructive device must be present: "any combination of parts either designed or intended for use in converting any device into a destructive device . . . *and from which a destructive device may be readily assembled.*"

[4] A cosmetically-similar semiautomatic model Uzi is imported into the United States only because BATF found it to be particularly

likely to be used in crime than any other type of firearm, including a long barrel rifle.[5] BATF has removed numerous short-barrel rifles, including semiautomatics, from the NFA because they are not likely to be used as weapons.[6] Under these circumstances, the Court of Appeals opinion—that items that will never be made into a short-barrel rifle do not constitute a short-barrel rifle—will not cause the sky to fall.

The Court of Appeals' decision contains no general statements of constitutional or statutory jurisprudence. Instead, it merely applies the law to the obscure, specific factual situation of the Contender pistol and carbine kit. The government's claims that the decision "drastically" erodes the NFA and that this case has "exceptional administrative importance" ring hollow. Petition 6.

Since passage of the NFA in 1934, this Court has never granted certiorari in a case where the only claim is that a court misapplied a definition of a type of firearm to a specific set of facts. NFA issues of interest to the Court have included the constitutional power of Congress to pass the NFA as a revenue measure, the Second Amendment, registration and self-incrimination, and scienter.[7]

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suitable for sporting purposes. 18 U.S.C. § 925(d)(3); *United States* v. *Rose*, 695 F.2d 1356, 1357 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 123. As in the case at bar, "the carton, the instructions, and the firearm itself contained warnings that modification of the firearm was unlawful." No one would suggest that the importer was responsible for the owner quickly and easily sawing off the barrel in that case.

[5] J. Wright and P. Rossi, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 94-95 (1986). Plaintiff's Claims Court Exhibits A58. The study was conducted under the auspices of the National Institute of Justice.

[6] *See* 26 U.S.C. § 5845(a) (last sentence).

[7] *Sonzinsky* v. *United States*, 300 U.S. 506 (1937); *United States* v. *Miller*, 307 U.S. 174 (1939); *Haynes* v. *United States*, 390 U.S. 85 (1968); *United States* v. *Freed*, 401 U.S. 601 (1971).

This case is of importance to Thompson/Center and to sportsmen who would be able to use Contender pistols and carbines without the need to purchase a separate receiver for each. However, the government has not shown that the Court of Appeals' decision warrants this Court's review.

ARGUMENT

I. THE DEFINITIONS OF "RIFLE" AND OTHER RELEVANT TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM

A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions

The Contender pistol and carbine kit is intended for use as a pistol with a 10″ barrel and a rifle with a 21″ barrel. Neither of these guns are "firearms" as technically defined in 26 U.S.C. Sec. 5845(a).

Mere capacity to convert a gun into an NFA firearm does not make the gun an NFA firearm. Otherwise, all long-barrel rifles would be short-barrel rifles, merely because the barrels can be quickly sawed off. Indeed, the government does *not* argue that a mere combination of parts which could be, but are not in fact and are not intended to be, made and assembled into an NFA firearm, constitute an NFA firearm. It agrees that a Contender pistol and a Contender carbine (each with its own separate receiver)[8] do not constitute NFA firearms.

As reenacted in 1968, the definition of "rifle" in the National Firearms Act, § 5845(c), is as follows: "The term 'rifle' means a weapon designed or redesigned, *made or remade*, and *intended* to be fired from the shoulder and designed or redesigned and made or remade to use

[8] The receiver is the housing to which the barrel, stock, and internal parts attach. See 27 C.F.R. § 178.11 ("firearm frame or receiver").

the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." The last definitional clause was added in 1968.

The 1968 amendments also included the following definition: "The term 'make' and the various derivatives of such word, shall include manufacturing . . ., *putting together*, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. § 5845(i).

Thus, "the term rifle means a weapon . . . *made or remade*" (§ 5845[c]), and "the term 'make' . . . shall include . . . *putting together*" (§ 5845[i]). The definition of "make" as "putting together" would have no meaning if a mere combination of parts which had never been put together as such constituted "a rifle having a barrel or barrels of less than 16 inches in length" as used in § 5845(a)(3).

By contrast, those firearms (i.e., machineguns and over .50 caliber rifles) which are defined in terms of combinations of the parts, are "made" even before being "put together."[9] These firearms are "made" when a combination of parts from which such firearms may be assembled are "manufactur[ed] . . . or otherwise produc[ed]" (§ 5845[i]), subject to, in the case of over .50 caliber rifles, the parts being designed or intended and readily capable of being assembled as such.

A Contender pistol and carbine kit fit neither of the two definitions of "rifle" having a barrel less than 16″.

[9] 26 U.S.C. § 5845(b) provides: "The term 'machinegun' means . . . *any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*" § 5845(f) defines "destructive device" to include a non-sporting rifle with a bore over .50 inches (or caliber), and a combination of parts designed or intended to assemble such a rifle, if the parts can be "readily converted" into such a rifle.

Mere parts never assembled as such neither constitute a "weapon" that "shoots," nor are they "restorable" to something they have never been.[10]

In sum, the 1968 Act introduced several new precise and carefully distinguishable terms. The term "rifle" is restricted to a "weapon" which is "made or remade," terms which include "putting together," and also includes an item which can be "readily restored" to be a rifle, which assumes that the item is being returned to a previous condition. By contrast, "machinegun" was amended to include, *inter alia*, "a combination of parts from which a machinegun can be assembled." Obviously, Congress did not intend the latter definition to apply to "rifle."

B. When Congress Intended to Define a Type of Rifle as Including a Combination of Parts, It Did So, and Then Only If Intent is Present

In the Gun Control Act of 1968, Congress wrote or rewrote definitions for two kinds of rifles: short barrel rifles, and rifles with bores of more than one-half inch in diameter ("destructive devices"). Congress sharply contrasted the definitions of these two kinds of rifles.

Congress broadly defined a "destructive device" in § 5845(f) in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)

[10] "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35. "The term which Congress saw fit to use in the statute, 'restorable', is defined by Webster 'to bring back to a former or normal condition, as by repairing. . . .'" *United States* v. *Seven Miscellaneous Firearms*, 503 F. Supp. 565, 574 (D.D.C. 1980).

The above was intended to include large bore military rifles without sporting uses, and combinations of parts intended to be assembled as such. The NFA definitions of both "rifle" and "destructive device" include fully made (assembled) weapons. However, while a "rifle" (including a short-barrel rifle) includes "any such weapon which may be *readily restored* to fire a fixed cartridge," a rifle with a bore of more than one-half inch in diameter is a destructive device if it "may be *readily converted* to expel a projectile". The broader "readily converted" language does not require that a device have previously been a destructive device. As a practical matter, the "readily-convertible" definition could not apply to "rifle," since every rifle is readily convertible to a short-barrel rifle by use of a hacksaw.

Neither definition includes a mere combination of parts from which a short-barrel rifle or rifle with bore over one half inch can be assembled. Only the latter includes "any combination of parts either *designed or intended* for use in converting any device into a destructive device . . . *and* from which a destructive device may be readily assembled." § 5845(f)(3).

This demonstrates that Congress rejected a strict "combination of parts" definition for NFA firearms in general, requiring in the case of destructive devices the elements both of design or intent,[11] and capability of being readily

[11] While "intended" normally refers to the intent of the person in possession, "design" refers to the intent of the manufacturer and the predominant use of a product. A product merely capable of

assembled. Congress did not adopt an absolute liability standard for rifles to encompass a combination of parts which are expressly *not* intended to be assembled with a barrel less than 16″ in length.

C. The Firearms Owner's Protection Act of 1986 and the Crime Control Act of 1990

In the 1986 amendments enacted as the Firearms Owners' Protection Act, Congress revisited and had ample opportunity to expand the definition of particular firearms by addition of "combination of parts" language such as already existed for machineguns and destructive devices. It did enact similar language in reference to two types of firearms, but did not do so in reference to the term "rifle."

The term "silencer" was not defined before 1986. The Firearms Owners' Protection Act added the following: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24) (emphasis added).[12] This precludes any interpretation that a mere combination of parts, without intent, is a silencer.

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illegal use is not "designed" for the illegal use. Thus, "items which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs." *Hoffman Estates* v. *Flipside*, 455 U.S. 489, 501 (1982).

[12] Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: " 'handgun means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from which a handgun can be assembled.*" P.L. 99-408, Section 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide: "It shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun which is identical to any rifle or shotgun prohibited from importation under § 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes. . . ." 18 U.S.C. § 922(r). In other words, a "rifle" does not exist until it is "assemble[d]" from "parts" (in this case, "imported parts").

By such enactments, Congress has again clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that even where it applies to certain NFA firearms, an intent requirement may exist.[13] BATF concedes that a combination-of-parts theory does not apply to possession of a complete pistol and a complete carbine, but illogically argues such theory if only one receiver is present. Nothing in the NFA justifies this expansion of the statute.

D. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle

Any conventional rifle can be made into an NFA firearm in a few seconds by sawing off the barrel. The government argues that mere capability of being made into an NFA firearm causes the Contender pistol and carbine kit to be an NFA firearm.

The government assumes that there is nothing to prevent a consumer from attaching the shoulder stock to the pistol. Imprisonment of ten years and a $10,000 fine seems adequate incentive to encourage consumers to ob-

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[13] The definitions of "destructive device" and "firearm silencer" both require that the combinations of parts be designed and/or intended to be assembled as such. Only "machinegun" does not include the intent requirement. "Rifle" has no combination of parts definition, with or without intent.

tain the Secretary's permission and pay a $200 tax before making a short barrel rifle. 26 U.S.C. §§ 5821, 5822, 5871. The government could also argue that there is nothing to prevent a dealer from selling Contender pistols and not paying income tax on the profits. Yet Thompson/Center is no more responsible for someone else's failure to pay a tax than it would be responsible for a murder committed with a Contender pistol and carbine kit.

BATF acknowledges that a complete pistol and complete carbine are *not* within the scope of the NFA unless the components are actually assembled as a short barrel rifle. (App. 3a) A complete pistol and a complete rifle are just as capable of assembly into a short barrel rifle as is a pistol and carbine kit, but do not constitute an NFA firearm unless "actually assembled" as such. The Petition's failure to mention this is revealing.

At oral argument, counsel showed the Claims Court actual samples of a complete pistol and a complete carbine—each with its own separate receiver—and illustrated with various tools how the barrels, shoulder stock, and grip are removed and assembled. (Appeals Appendix 107-109.) The government uses this demonstration to argue that a pistol and carbine *kit* may be used to "create" an NFA firearm. Petition 3 n.2. In fact, it showed that a complete pistol and a complete carbine—which is concededly not an NFA firearm—can be used to make such a firearm.

This demonstrates the absurdity of the agency's "one receiver" theory. If the pistol and carbine kit use the same receiver, a short-barrel rifle allegedly exists, even though one is never created. If two receivers are present —one for the pistol and one for the carbine—a short-barrel rifle admittedly does not exist. Nothing in the statute sanctions this contradictory result.

The NFA defines some firearms as combinations of parts (machineguns), others as combinations of parts with intent (destructive devices, silencers), and still others without any such definition (rifles). The government ignores these differences and claims that rifles are implicitly defined the same as machineguns.

"Rifle" means a "weapon" that has been 'made" (§ 5845(c)), not parts from which a weapon "can be made." *Any* rifle "can be made" into an NFA firearm by sawing off the barrel.[14] The government does not attempt to explain why other NFA firearms have combination-of-parts definitions but "rifle" does not.

Similarly, the government's discussion of the term "make" in § 5845(i) ignores why Congress saw fit to include "putting together" as a definition. There must be at least something that must be "put together" before it is an NFA firearm, or this definition would not exist. It must be an NFA firearm—such as "rifle"—that is not defined as a combination of parts. The government's focus on the definition of "make" as "or otherwise producing a firearm" begs the question, for it does not address when a firearm is made or produced.

The government assumes that lack of intent to make a Contender pistol and carbine kit into a short barrel rifle is irrelevant. However, all the evidence in the record is that no owner would have any intent to make such a rifle. The very definition of rifle includes the terms "*intended* to be fired from the shoulder." § 5845(c). It was never suggested in this case that Thompson/Center or anyone else did or would possess a pistol and carbine kit with the intent to make a weapon with a short barrel to be fired from the shoulder.

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[14] The government seems to assume that if a tax crime can be "quickly and easily" committed, then it already has been committed. Yet one has not murdered someone just because one could "quickly and easily" do so, and one has not violated the Internal Revenue Code just because one could "quickly and easily" do so.

When Congress intended that combinations of parts possessed with a certain "intent" were NFA firearms, it said so. §§ 5845(f)(3); 5845(a)(7) (incorporating 18 U.S.C. § 921(a)(24)). No such definition exists for "rifle."

In ordinary English, to be "restored" means to return to a previous condition. Congress recognized this in enacting both "readily restored" and "combination of parts" definitions of "machinegun." "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35.

The government argues that Congress would not have adopted a readily-restorable test without also adopting a readily-convertible (or readily-makable) test. Petition 9. Congress did not do so, because every rifle is readily convertible in seconds by sawing to be a short-barrel rifle. It adopted no readily-makable test because pistol and rifle parts may be interchangeable; indeed, the government agrees that a complete pistol and complete carbine, while interchangeable, are not a short-barrel rifle. Perhaps Congress adopted a readily restorable test because the item had been a functional NFA firearm, was presumably possessed with intent to restore to such a weapon, and could be so restored in seconds (e.g., using a nail for a firing pin, such as in *United States* v. *Cosey*, 244 F. Supp. 100, 102 (E.D. La. 1965).

For whatever reasons, Congress chose the word "restore." The Contender pistol and carbine kit "can be assembled"—the government is careful not to say "restored"—into a short-barrel rifle in less than five minutes. Petition 9 n.7.

The government suggests that the Court's opinion would have a detrimental impact on enforcement of the firearms laws. No basis exists for this assertion. The only practical impact of the decision is that consumers need not purchase a complete pistol and a complete rifle—each with an identical receiver—but may purchase a pistol and rifle parts with only one receiver for use with each.

The government argues that some products, such as a bicycle, are shipped unassembled.[15] Petition 8. To use the same analogy, no one would say that bicycle handle bars are clubs, or that chains are weapons, just because they could be so used. Further, a bicycle is intended to be assembled into one and only one product, and is not defined in technical, legal terms in a taxing statute with criminal penalties. A better analogy would be a bottle, gas, and a rag, which constitute a Molotov-cocktail—an NFA firearm—only if assembled or intended to be assembled as such.[16]

The government misreads *Haynes* v. *United States*, 390 U.S. 85, 88 (1968), which states only that "the acts of *making* and *transferring* firearms are broadly defined." Petition 7. This only says that *any* making or transferring of a firearm are encompassed within the statute, not that the firearms themselves are broadly defined. *See United States* v. *Biswell*, 406 U.S. 311, 313 n.2 (1972) ("the sawed-off rifles . . . fell under 26 U.S.C. § 5845's technical definition of 'firearms'"). In fact, the NFA definition of "firearm" encompasses such guns as are generally known to be highly regulated, not such innocuous sporting guns as a Contender pistol and carbine

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[15] The government also states that rifles may be sold with bolts detached, and that shotguns have removable barrels. Petition 8 n.5. There is nothing in the record concerning this point. It could be that the bolts may be inserted in five seconds.

[16] As stated in *United States* v. *Posnjak*, 457 F.2d 1110, 1119 (2nd Cir. 1972): "When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important."

kit.[17] The National Firearms Act "may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons. . . ." *United States* v. *Freed*, 401 U.S. 601, 609 (1971). As noted by Justice Brennan, concurring: "the firearms covered by the Act are major weapons such as machine guns and sawed-off shotguns. . . . Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it." *Id.* at 616.

The government position in this case does not pass the above "smell test" set forth in *Freed*. No one would ever guess, much less presume, that a Contender pistol and carbine kit are supposedly a "major weapon" and an NFA firearm. Defendant argues that the NFA is generally applicable to "gangster-type" weapons, but does not contest that the Contender pistol and carbine kit is not a criminal-type weapon. Defendant's argument reduces to absurd, bureaucratic hair-splitting nowhere suggested in the statute: an NFA firearm exists if only one Contender receiver is used to make a pistol and carbine, but does not exist if two identical Contender receivers are used. Nothing in the statute even hints at this arbitrary distinction invented by the agency.

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[17] As stated in *United States* v. *Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc):

> As used in the Act, the word "firearms" is a term of art that includes primarily weapons thought to be of a military nature and of no legitimate use for sport or self-defense. . . .
>
> Instead, the term is defined in the Act so as to narrow its meaning vastly in most respects. . . . Generally speaking, all such categories of ordinary rifles, pistols and shotguns as might be found in a gun shop are excluded from its meaning, with only a few easily-concealable items such as sawed-off shotguns included, along with machine guns.

II. THE DEFINITIONS AT ISSUE MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER

Given the clear language of the statutory definitions, the Contender pistol and carbine kit do not constitute taxable "firearms" under § 5845(a). At the very least, considerable doubt exists as to whether the items are taxable.[18] Thus, this case comes under the rule set forth in *Gould* v. *Gould*, 245 U.S. 151, 153 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

The definitions in the National Firearms Act are subject to the above rule of construction. "On its face it [the NFA] is only a taxing measure . . . ." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937).[19] "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Id.* at 512.

In addition, since it provides serious criminal penalties for violation, the National Firearms Act must be inter-

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[18] The government claims that the items here are "clearly" regulated weapons. Petition 5. In the court below it conceded: "When the facts of this case are compared to the language of § 5845, the statutory terms alone do not clearly indicate whether the Contender pistol and conversion kit together constitute a firearm." Appellee Brief 12.

[19] *Haynes* v. *United States*, 390 U.S. 85, 88 (1968) described the National Firearms Act as "an interrelated statutory system for the taxation of certain classes of firearms." "The making and transfer taxes under the NFA are a form of excise tax." *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38, 42 (D.N.H. 1988) (holding that the Contender carbine kit must be litigated as a tax refund claim).

preted in favor of lenity. "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it' . . . ." [20] *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

The presence in NFA of three vastly different "combination of parts" definitions, and the absence thereof in the definition of "rifle," indicates that no such definitions apply to "rifle." *Commissioner* v. *Engle*, 464 U.S. 206, 223 (1984) states: "We must dismiss the Commissioner's reconstruction of the legislative intent as mere wishful thinking . . . . We have noted that '[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections. . . .' "

Russello v. *United States*, 464 U.S. 16, 23 (1983) distinguishes a section of a criminal statute which "speaks broadly" of certain acts, from other sections with "less expansive language," and states:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each.

[20] " 'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . 'When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971) (construing Gun Control Act terms in favor of felon in possession of firearms).

"Rifle" having no definition like "combination of parts when possessed with only one receiver," such definition may not be imposed by bureaucratic or judicial fiat. As stated in *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962):

> We are not at liberty . . . to add to or alter the words employed to effect a purpose which does not appear on the face of the statute. . . . Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed to do or elected not to do. This of course, is not within our province.

The government argues that the kit would allow a manufacturer to "avoid the tax." Petition 8. Yet it is perfectly legitimate to avoid taxation simply by not making a taxable product. As Judge Learned Hand remarked, "Over and over courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible." *Alinco Life Ins. Co.* v. *United States*, 178 Ct.Cl. 813, 373 F.2d 336, 345 (1967).

III. THE CIRCUITS ARE NOT IN CONFLICT

A. No Other Reported Cases Concern a Pistol and Carbine Kit

This is a case of first impression. Other than the Court of Appeals' decision, no other Court has ever addressed whether a pistol and carbine kit intended only for making a rifle with a barrel over 21″ nonetheless constitutes a rifle with a barrel under 16″. The circuits are not in conflict.

The government argues that a pre-1968 machinegun case is somehow relevant, because it was decided before Congress adopted "combination-of-parts" language. The government does *not* cite *United States* v. *Lauchli*, 371 F.2d 303, 311 (7th Cir. 1966), which stated "that the purchasers demanded operable machineguns, the defend-

ant assembled seven of them . . . ." The government does rely on *United States* v. *Kokin*, 365 F.2d 595, 596 (3rd Cir. 1966), but the conviction was affirmed "in the circumstances elaborated in the opinion of the district court . . . ." *Id.* at 596. While unpublished, that opinion was available to the court in *Lanchli*, which states: "As in *United* v. *Kokin*, . . . this defendant even assisted in the assembly of seven of the weapons." 371 F.2d at 313.

Besides machineguns, the government discusses silencers, which are equally irrelevant to the definition of "rifle."[21] Petition 8, 14. These silencer cases are further inapplicable because Congress revisted the issue in 1986, and determined which combination of parts would constitute silencers—i.e., parts "designed or redesigned, and *intended* for use in assembling or fabricating a firearm silencer."[22] This precludes combinations of parts which could be, but are not "intended" to be, assembled as silencers.

In *United States* v. *Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978), for purposes of finding probable cause for a search, the court held that a short barrel found near the rest of a shotgun "was capable of being 'readily restored to fire a

[21] The government relies on *United States* v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) and *United States* v. *Luce*, 726 F.2d 47 (1st Cir. 1984). Unlike the pistol and carbine kit, there was only one manner in which to assemble these silencer parts, that manner was unlawful, and the parts "could be joined together within a few seconds." *Luce*, 726 F.2d at 49; *Endicott*, 803 F.2d at 509. These opinions approved jury instructions, and did not state as a matter of law that all such combinations of parts were silencers. *See* 803 F.2d at 508-509.

[22] 18 U.S.C. Sec. 921(a)(24); 26 U.S.C. Sec. 5845(a)(7). By requiring intent, the statutory amendment repudiates *Endicott* and *Luce*, which required no intent. Thus, Congress rejected these decisions on the very point for which the government relies on them—a strict liability, no intent, combination-of-parts definition for *every* NFA firearm.

fixed shotgun shell'. . . ."[23] Nothing in the case suggests that the short barrel was possessed for some innocent, nontaxable purpose.[24] The jury may well have heard evidence that the barrel had previously been attached to the rest of the weapon. By contrast, in the case at bar, the short barrel is possessed only for use in pistol configuration.

The government claims that *United States* v. *Combs*, 762 F.2d 1343, 1345 (9th Cir. 1985) is inapplicable (Petition 14 n.11), yet that case held a person to have "made" a short barrel rifle under Section 5845(i) because he assembled it as such:

> The Uzi rifle is sold in the United States with a 16-inch barrel and has a warning imprinted on it that it is illegal to modify the weapon in any way. In addition, the instructional manual that comes with the Uzi states that to take out the 16-inch barrel and replace it with a shorter barrel creates an illegal weapon. The evidence at trial indicated that *the barrel originally attached to the rifle was detached and the shortened barrel installed* in its place. . . . Combs *bought the shorter barrel and installed it. Thus the Uzi* was altered by Combs and therefore *was "made" within the terms of the statute. Id.* at 1347. (Emphasis added).

[23] None of the cases cited by the government, except *Drasen, infra*, involve a rifle. *E.g., United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (machinegun). In *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 (D. Conn. 1973), which involved a readily restorable sawed-off shotgun, the court denied a motion to dismiss an indictment, and thus did not find that the item was an NFA firearm beyond a reasonable doubt. In neither of those cases were there legitimate, non-NFA uses for the items in question.

[24] Whether used with a shoulder stock or on a pistol, a shotgun (smooth bore) barrel under 18" makes an NFA firearm. 26 U.S.C. § 5845(a)(1), (5), (d), and (e). By contrast, the 10" Contender pistol barrel has a legitimate non-NFA purpose. Accordingly, comparisons to shotgun barrels are irrelevant.

B. While Flawed, *Drasen* Does Not Apply to the Products at Issue

The primary case relied on by the government is *United States* v. *Drasen*, 665 F. Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988). However, the Contender pistol and carbine kit is easily distinguishable from this opinion in which two judges could not agree with two other judges on whether rifle parts kits can be "rifles" for purposes of a pretrial motion to dismiss the indictment.[25]

The district court rejected the government's argument that the "readily restored" definition of "rifle" includes parts from which a rifle had never been constructed, because "all persons of common intelligence understand 'restore' to mean 'return to a previous condition.' People are not required to divine the government's secret modification of that definition . . . ." 665 F. Supp. at 603. The "weapon" definition of rifle does not apply because "the court has great difficulty seeing how the never-assembled constituent parts of a rifle are themselves a weapon 'made' to fire." *Id.* at 608.

In a 2-1 opinion, the Court of Appeals reversed and remanded to allow the fact finder to decide the issue. The court framed the issue to concern "constituent parts of a rifle" (845 F.2d at 732)—again distinguishing that case from the case at bar, in which indisputably the long barrel is the part of a rifle, and the short barrel is the part of a pistol.

The *Drasen* majority substitutes the euphemism "common sense interpretation" when it is unable to explain the clearly different definitions of rifle and machinegun. *Id.* at 731. Its reading into the statute of an implicit "combination-of-parts" definition for *all* NFA firearms is plainly inconsistent with the explicit "intent" require-

[25] The government's account of what *Drasen* "found" ignores that the case was remanded for trial. Petition 12-13.

ments in the definitions of destructive device and silencer.[26] This explains why the Congressional sponsors of new "combination of parts" language in the Firearms Owners' Protection Act of 1986 filed an amici curiae brief against the government's position in *Drasen*.[27]

The majority opinion in *Drasen* is based on an intellectually nihilistic inability to explain why an NFA "rifle" has no combination-of-parts definition, but three other NFA firearms do have such definitions. It is at a total loss to explain why rifle is defined as an operable "weapon"—"*intended* to be fired from the shoulder" at that—or as a "readily restorable" weapon, but that a machinegun is a weapon, a readily restorable weapon, *or* a combination of parts from which a complete weapon can be assembled.[28]

[26] The court was flatly wrong in asserting (845 F.2d at 735) that Congress did not amend the definition of silencer to include a combination-of-parts-plus-intent definition for "silencer." §§ 101, 109, P.L. 99-308, 100 Stat. 451, 460 (May 19, 1986).

[27] Amici included Senators Orrin E. Hatch and James A. McClure and Congressman Larry E. Craig. 845 F.2d at 732 n.4. Congressman Craig put forward as a floor amendment in the House the new definitions of silencer and machinegun. Senators Hatch and McClure explained the new definition of machinegun, which concerned conversion parts only. 132 CONG. REC. H1700 (Apr. 9, 1986); 132 CONG. REC. S5362-5363 (May 6, 1986).

[28] The majority's insinuation that the "combination-of-parts" definition means that "every single [machinegun] part could be subject to regulation" is nonsense. 845 F.2d at 737; *see* Petition 9. (It is unclear how this proves that rifle has some kind of implicit combination-of-parts definition.) The definition is not "any machinegun or part thereof," but is "any *combination* of parts from which a machinegun can be assembled if *such parts* are in the possession or under the control of a person." § 5845(b). As noted by Senators Hatch and Kennedy in debate on the 1986 amendments, most machinegun parts are not even regulated. 132 CONG. REC. S5362-63 (May 6, 1986).

The *Drasen* majority's argument was repudiated in *United States* v. *Bradley*, 892 F.2d 634, 636 (7th Cir. 1990), because "a statutory

Since the *Drasen* majority cannot explain why "rifle" has no combination-of-parts language but other firearms do, it attacks this "nonsensical statutory distinction" enacted by Congress and adds that "defendants would have us draw the conclusion that for some inexplicable reason Congress intended to distinguish short-barrel rifles." [29] 845 F.2d at 736-37. Congress can conjure up any "nonsense" it wishes, and give or not give "explicable" reasons, when it decides what to tax and what not to tax, and the latter is not thereby a "loophole" for courts to abrogate.

Since it seeks to impose a strict liability, combination-of-parts definition for all NFA firearms, the *Drasen* majority carefully ignores the definition of destructive device. A combination of parts from which a destructive device "could" be assembled—such as a bottle, firecracker, and paint thinner—is not such a device unless intent to do so exists. *United States* v. *Tankersley*, 492 F.2d 962, 966-67 (7th Cir. 1974). "While the components separately have social utility, in combination they form a destructive device. . . ." *Id.* The Contender pistol and carbine kit is no more an "unassembled" short-barrel rifle than gasoline, bottles, and rags in a household are "unassembled" Molotov cocktails and hence "destructive devices."

Drasen assumes that a manufacturer of a parts kit is responsible for a consumer committing a tax offense, i.e., making a short barrel rifle without following the procedures in the NFA. Yet firearms manufacturers are not responsible if a consumer commits a murder with a

machinegun" exists only "if one person has possession or control of *all* of the parts."

[29] Yet as Judge Manion noted in dissent, "the definition of 'machinegun' shows that when Congress wanted to regulate combinations of parts, or 'any' parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle." *Id.* at 738.

firearm. *Martin* v. *Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984) held that "criminal misuse of a handgun is not a foreseeable consequence of gun manufacturing." If a handgun manufacturer is not responsible for a murder, it is difficult to understand why Thompson/Center is being held responsible because some consumer "could" commit a tax offense.

The majority opinion in *Drasen* frankly admits that the pertinent terms could easily be interpreted to exclude the items in question from being NFA firearms.[30] The court thereby completely disregards the cardinal principles that tax statutes are to be construed in favor of taxpayers, and that criminal statutes are to be resolved in favor of lenity.

C. At the Government's Urging, *Drasen* Was Based on a Revenue Ruling Which Was Revoked in 1972

The Petition is conspicuously silent about a revenue ruling on which the government relied in *Drasen* and in the Claims Court in this litigation. This silence may be attributable to the fact that only on appeal did Thompson/Center discover that the agency had long ago declared the ruling to be obsolete.

The Claims Court opined that "published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. . . . Rev. Rul. 54-606, 1954-2, C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm." Appendix 28a. The Court then (*id.* n.2) cited

[30] The Court admits: "Applying the facts of this case, the statute on its face is not clear. . . . It is apparent that to clarify the statute, little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. . . . This definition ['make'] suggests that, to produce a firearm, 'putting together' the parts is necessary." *Id.* at 733.

Drasen, 845 F.2d at 736, which is the only published opinion ever to approve this 1954 Revenue Ruling.[31]

Instead of informing the court that Revenue Ruling 54-606 had been declared obsolete in 1972, the prosecution in *Drasen* claimed that the ruling "squarely decides the issue before this court."[32] The *Drasen* majority relied primarily on Revenue Ruling 54-606. In arguing that the Supreme Court not grant Drasen's petition for certiorari, the Solicitor General relied principally on the revenue ruling.[33]

While unknown to the Claims Court, to the *Drasen* majority, and to this Court when it considered Drasen's petition, the Department of the Treasury officially repudiated Rev. Ruling 54-606 in 1972. Because Congress clarified in the Gun Control Act of 1968 which NFA firearms would be defined as combinations of parts and which would not,[34] Revenue Ruling 72-178, 1972-1, C.B. 423-24 held:

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[31] In the Claims Court, the government repeatedly assured the court that Revenue Ruling 54-606 had never been modified or revoked. *E.g.*, Memo. in Opp. to Plaintiff's Mot. for Sum. Jud. at 4.

[32] Reply Brief for the United States, *United States* v. *Drasen*, U.S. Court of Appeals for the Seventh Circuit, at 8.

[33] *See* Memorandum for the United States in Opposition, *Drasen* v. *United States*, U.S. Sup. Ct., No. 88-430, at 2 which describes the dismissal of the indictment by the district court and states:

> The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33.

The Solicitor General made several more references to the ruling and never informed the Court that the ruling had been revoked in 1972.

[34] Rev. Ruling 54-606 was not mentioned in the entire legislative record which culminated in the 1968 legislation. Without being aware of the ruling, Congress repudiated it except with regard to machineguns.

> Numerous changes in the law . . . necessitated a review of all outstanding revenue rulings issued under Chapter[] . . . 53 of the Internal Revenue Code of 1954 (the National Firearms Act] . . . .
>
> It has been determined that the following list of revenue rulings are inapplicable either in whole or in part to the current law and regulations . . . . Therefore, these revenue rulings are found to be no longer in effect, and are hereby declared to be obsolete. *Rev. Rul. No.* . . . . 54-606.

Nothing in the current regulations, 27 C.F.R. § 179.11, reflects or relates to Revenue Ruling 54-606 in any way.[35] The ruling was declared obsolete because it was "inapplicable either in whole or in part to the current law and regulations." Rev. Rul. 72-178. The "*current* law" was, of course, the 1968 amendments which clarified which firearms under the National Firearms Act include combinations of parts and which do not.

The court's lack of knowledge of this revocation has resulted in a grave miscarriage of justice. The *Drasen* case involved a criminal prosecution in which the liberties of citizens were at stake. It is unknown whether governmental counsel in *Drasen*—the Solicitor General, the Department of Justice attorneys, the U.S. attorney's office or BATF counsel—were aware that Revenue Ruling 54-606 was revoked. It is inconceivable that the 2-1 appellate decision in *Drasen*, or the Claims Court opinion in this case, would have heavily relied on a ruling known to be obsolete. The respective court's knowledge of this obsolete status may well have led to the opposite result.

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[35] 27 C.F.R. § 179.11 includes definitions of terms. The definitions of "rifle," "machinegun," and other firearms simply repeat verbatim the definitions in 26 U.S.C. § 5845. BATF has not published a single ruling which embodies the content of the revoked ruling, even though "it is the policy of the Bureau to publish in the [ATF] Bulletin all substantive rulings necessary to promote a uniform application of all laws administered by the Bureau. . . ." 27 C.F.R. § 71.41(d).

In sum, *Drasen*—the government's main "precedent"—is based on a revenue ruling which, unbeknown to the court, had been declared obsolete. The government's amnesia about its promotion of this revoked ruling illustrates the unreasonableness of its position in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN P. HALBROOK *
10605 Judicial Drive
Suite B-3
Fairfax, VA 22030
(703) 385-8610
Attorney for Respondent

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* Counsel of Record